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July 8, 1992

Our File: 05057/002001

BY HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

Petition for Clarification and Modification of
Pay-Per-Call Rules Filed by the National
Association of Attorneys General
Petition for Rulemaking -- RM No. 7990

Dear Ms. Searcy:

Attached hereto are the Comments of Pilgrim Telephone,
Inc. in the above proceeding.

Very truly yours,


Walter Steimel, Jr.

/jbo

Enclosure

cc (w/encl.) Thomas David

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
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Petition for Clarification and)
Modification of Pay-Per-Call)
Rules Filed by the National)
Association of Attorneys)
General)
)

Petition for Rulemaking
RM No. 7990

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Federal Communications Commission
Office of the Secretary

COMMENTS OF PILGRIM TELEPHONE, INC.

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Dated: July 8, 1992

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
Petition for Clarification and)	Petition for Rulemaking
Modification of Pay-Per-Call)	RM No. 7990
Rules Filed by the National)	
Association of Attorneys)	
General)	

COMMENTS OF PILGRIM TELEPHONE, INC.

Pilgrim Telephone, Inc. ("Pilgrim"), by and through its attorneys, hereby files its comments in the above-referenced proceeding.¹

I. Introduction

Pilgrim is an interexchange carrier ("IC") providing a variety of 800, dial 1 and other services on an interstate basis, and is an interested party which would be impacted by the proposals contained in the Petition. Pilgrim supports the Petition's request for an order clearly affirming that pay-per-call services that use 800 numbers are covered by and must comply with the Commission's existing pay-per-call regulations. Pilgrim opposes, however, the

¹ Petition for Clarification and Modification, National Association of Attorneys General, Notice of Petition for Rulemaking, 57 Fed. Reg. 26,642 (June 15, 1992) ("Petition").

second relief requested in the Petition -- an order prohibiting interstate carriers from providing 800 service under certain specified conditions, for a number of reasons. These reasons, discussed below, include the following:

- (1) the proposed solution cannot be effectively or legally implemented by the ICs;
- (2) the Petition does not raise an issue which requires a change in the Commission's rules, but rather an enforcement problem, as the activities discussed in the Petition are currently prohibited by existing pay-per-call regulations, as recognized in the Petition;
- (3) the proposed solution could frustrate consumers who intend to use pay-per-call services via 800 numbers; and
- (4) the proposed solution is directed against the wrong party, and requires enforcement by ICs.

In addition, the offending activities discussed in the Petition would be more adequately addressed by Pilgrim's alternative solution, discussed below, which would provide more effective consumer protection and preserve greater consumer choice.

II. Pay-Per-Call Regulations Apply Regardless Of The Exchange

Pilgrim believes that the existing pay-per-call regulations clearly define pay-per-call services, and that these regulations currently apply to calls placed using any dialing prefix, including 800. There is no need for a call to be dialed using 900 or 976 prefixes in order to correspond to the definition of pay-per-call. This definition was expressly discussed by the Commission in its order adopting the pay-per-call regulations, and clearly adopted by the Commission.

As the expressed intention of the Commission in the adoption of its rules was clear, Pilgrim supports the request in the Petition for an order confirming this interpretation of the existing pay-per-call regulations. This result can be adequately accomplished by the Commission through the issuance of a declaratory ruling. A declaratory interpretation of the Commission's pay-per-call rules would not require the institution of a rulemaking proceeding, and could be accomplished based upon the record of the underlying proceeding, or the comments and replies in this proceeding.

III. The Second Recommended Solution In The Petition Is Overly Broad And Vague, And Should Be Accomplished Through Interpretation Or An Alternative Solution, If Necessary

A. ICs Cannot Implement The Recommended Solution

The solution recommended in the Petition regarding 800 service cannot be legally or practically implemented by the ICs. The Petition's solution would require ICs to ascertain whether the offending conduct was taking place, and terminate calling rights based upon that determination. If a message telephone service ("MTS") subscriber was only converting 800 service to pay-per-call on an occasional basis, the IC would only be permitted to terminate the selected individual calls, as the IC is otherwise legally obligated to carry all traffic on a non-discriminatory basis and could be sued by the MTS subscriber for wrongful termination of service.

Under the Petition, ICs would be called upon to either make character determinations regarding particular MTS subscribers, or to monitor calls. In instances where only occasional conversion of 800 calls was taking place, the IC may be required to monitor every call to determine which should be terminated. Monitoring of the calls by the IC would not be permissible under law, however, and would be contrary to public policy.

Not only would such monitoring arguably be in violation of the law, it presents a practical problem. ICs do not have the

resources or the manpower to monitor calls, even on an occasional basis. It is apparent that ICs cannot know what the called party does before, during or after the call, and, therefore, cannot effectively police the actions of its customers. ICs should not be called upon to refuse MTS service, police the uses of MTS service, or judge which customers should be permitted or refused MTS service.

B. The Second Issue Does Not Arise From Weakness In The Rules, And Requires No Solution

The problem identified in the Petition is that consumers have been billed for pay-per-call services they did not intend to purchase. The Petition recognizes that the MTS subscriber providing the service did not comply with the Commission's pay-per-call rules, stating that "certain of these 800 pay-per-call services are not complying with the requirements of the FCC Pay-Per-Call Order." See Petition at 3.

As the existing pay-per-call regulations are more than adequate to prohibit the activities identified in the Petition, the adoption of additional regulations which prohibit every possible hypothetical example is not a proper solution. The solution recommended in the Petition attempts to resolve an enforcement problem by either eliminating a service category, or adopting solutions which cannot be implemented. This approach will deny service to consumers who desire to purchase products or services

through 800 numbers. The adoption of regulations targeted to one service, such as 800, may also encourage migration to other services, perpetuating any perceived problem. The Commission cannot resolve an enforcement matter by adopting additional prohibitions.

C. The Recommended Solution Is Directed Against The Wrong Party

The solution recommended in the Petition is also directed against the wrong party, namely ICs carrying MTS calls rather than the party who is generating consumer complaints. Pilgrim has demonstrated the legal and technical difficulty associated with the proposed solution. Any additional regulations which may be necessary should be directed against MTS subscribers who bill consumers for unwanted service, and not against common carriers.

It also should be noted that 800 pay-per-call services differ from most 900 pay-per-call services significantly in that the carrier is not involved in billing and collection, and therefore is not a party to any transaction. Even in the sample complaint contained in the Petition, the bill for the offending service was sent to the consumer by a private billing company, and not by a common carrier. The Commission should direct its attention to the parties to the transaction, and not require collateral enforcement by ICs or other parties providing only transmission services.

D. If The Commission Determines A Need For A Solution, It Should Adopt Pilgrim's Alternate Proposal

If the Commission determines that additional regulations are needed to resolve the issues identified in the Petition, Pilgrim recommends that the existing pay-per-call rules be interpreted to require positive acceptance of the charges for any pay-per-call service on 800 numbers, or to all pay-per-call services whether or not 800 number based. A uniform pay-per-call regulation would have the added benefit of uniform application to all dialing patterns for any pay-per-call services.

There are many benefits to requiring positive acceptance for all pay-per-call services. Positive acceptance addresses the essential issues presented in the Petition by providing consumers with the opportunity to always knowingly accept charges. Positive acceptance provides maximum consumer choice, permitting consumers to elect to use pay-per-call services on any exchange. This solution is directed against the appropriate party, namely the party who will bill the consumer, and not only avoids the problem of common carrier monitoring of call content, but also avoids involving common carriers in private contracts between calling and called parties. By limiting its application to the parties to the call, it comports with traditional contract notions of offer and acceptance between private parties.

This solution could be accomplished by extending the positive acceptance requirement contained in Section 64.715 of the Commission's rules. The Commission has already recognized positive acceptance as a vehicle for controlling pay-per-call service, and this could logically be extended to all pay-per-call services within the Commission's existing regulatory structure. It may be possible for the Commission to adopt an interpretation of Section 64.715 which would achieve this result without instituting a rulemaking proceeding by determining that any time the billing on a call is reversed, the calling party becomes the called party. This has adequate precedent, and could be adopted within an interpretative context.

IV. Conclusion


Pilgrim supports the first recommendation in the Petition, and encourages the Commission to adopt the proposal by issuing a declaratory ruling. The second issue discussed in the Petition, however, does not indicate a problem with the Commission's current rules, and the proposed solution is overly broad, vague and unworkable. If the Commission determines that some resolution of the issue is warranted, however, it should consider the alternative solution recommended by Pilgrim. The

Commission may achieve any intended result by adopting an interpretative declaratory ruling and avoid a rulemaking.

July 8, 1992

Respectfully submitted,

PILGRIM TELEPHONE, INC.



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